Nos. 17,058 — 17,059

IN THE

United States
Court of Appeals

For the Ninth Circuit

FOOD MACHINERY AND CHEMICAL CORPORATION, a corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION,

and

J. R. SIMPLOT COMPANY, a corporation,

Appellants.

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

PETITION FOR REHEARING EN BANC

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SUBJECT INDEX

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I. PRELIMINARY STATEMENT

This was an action for damages allegedly resulting from the operation of defendants' plants to plaintiffs' trout hatchery. The case, tried on a nuisance theory, resulted in a jury verdict for the plaintiffs, and judgment for damages. Upon appeal to this Court, the judgment was affirmed before a division of this Court composed of Justices Orr, Hamley, and Hamlin. Just-

ice Hamlin wrote the opinion of the Court.

As will be hereinafter in this petition demonstrated, serious error has been committed by the panel of the Court hearing this appeal, which justifies a rehearing thereof before this Court, sitting en banc.

II. GROUNDS FOR REHEARING EN BANC

A. The Court has clearly and obviously in its opinion, misstated the record on matters of evidence, vitally important to a correct determination of this appeal.

B. The Court has erred in failing to determine Appellants' Assignment of Error, No. 7, page 15, of their opening brief, which proposition of law is supported by authority, virtually undenied by Appellees.

C. The sole case relied upon by the Court to sustain its conclusion that the evidence in the case is sufficient to establish causal connection between acts of Appellants and damage to Appellees, — *Comeau v. Beck*, 319 Mass. 17, 64 NE (2d) 436 (1946) — is distinguishable from and inapplicable to the case at bar, and contrary to the substantive law of Idaho.

D. The decision of the Court departs from the law laid down in the prior fluorine cases decided by this Circuit.

E. From its discussion, Paragraph II, pages 11 and 12 of the opinion, it is apparent the Court has misunderstood Appellants' position with respect to the matters raised in Paragraph VI (c) of their opening brief.

III. DISCUSSION OF THE GROUNDS FOR REHEARING EN BANC

A. With deference we state the Court, by its affirmance of the judgment has clearly misunderstood and incorrectly referred to the printed transcript as showing, or not showing, certain facts, which errors and mistakes are clearly set forth and referred to as follows:

(1) On page 7 of the Opinion, in referring to Dr. Wohlers' testimony, the Opinion states.

> "However. it is worthy of note that he did not begin to run any tests until 1954, and that the tests on the leaves on the willows were not run in the "unwashed state." It would seem that it was not unreasonable for the jury to fail to give weight to these studies when it was shown that the leaves were washed before they were tested for fluoride concentrations. Washing would mean that the only fluorides that would show up in the measurements were those that had been absorbed by the leaf. Any fluorides that might have been resting on the leaves would have been washed away before the tests were made."

The above is not the testimony of Dr. Wohlers and cannot be so construed. R1010 and R1038. Dr. Wohlers ran the tests for total fluorides and only stated that he did not run them both in the "washed" and "unwashed" state. The tests, the day Meader called him to the trout farm, showed the total fluorides *on and in the leaves tested.*

An unintentional and grave injustice has been done to Dr. Wohlers as an expert witness and to the defendants in this misinterpretation of positive, undenied testimony. The tests were run in the "unwashed state." Dr. Wohlers did not run them in both the "washed" and the "unwashed" state, but running the tests for total fluorides was much more favorable to the plaintiffs and gave less chance of error than if an attempt was made to run two tests. R1036 and R1037. Dr. Wohlers further offered to break it down, R1038, as to soluble fluorides.

(2) On page 8 of the Opinion it is stated.

> "No one ever specifically analyzed one of the dead fish in order to determine whether it died of fluorosis, — apparently because no one ever was around to do so at the time that there were dead fish."

The positive, uncontradicted testimony of Dr. Wohlers is that he took some of the dead fish the day after the rain when Meader called him to the hatchery. These fish were analyzed for fluorine content and showed 173 ppm F for the whole fish, R1010. There was no denial of this fact and Dr. Wohlers considered the fluorine analysis of both the fish and leaves in his positive statement that fluoride was not the cause of the Meader damage.

(3) Following the statement (2) quoted above and a part of the same paragraph of the Opinion, page 8, we find this statement:

> "The best that we have are some analyses that

show higher than the three parts per million referred to by Dr. Gale as the danger area."

Exhibit 18 is not the only analysis of fish in the record, nor is it the best and only evidence we have. Dr. Greenwood, Exhibit 17, R512-13 made analyses of dead fish furnished to him by appellees. R510. We have Exhibits 18, 17 and Dr. Wohlers' analysis, R1010, all made from fish taken at different dates for analysis. It is clear, and the record so shows as above referred to, that these analyses were made of the *dead* Meader fish, the smaller fish analyzed being taken from the screen where Meader states they were dying.

Further, we correct the Court by stating that Dr. Gale did not refer to 3 ppm F in the whole fish, or any part of the fish, as being in the danger area. His testimony cannot be so construed, and we refer to Gale's testimony, R187 and 288. He would expect from 200 to 700 ppm of fluorine in bones of healthy trout in the same water.

(4) The Court, on page 7 of its Opinion states.

"However, we feel that from his testimony the jury could reasonably conclude that a concentration of over three part per million of fluoride in water could be harmful to adult fish and potentially more harmful to immature fish and to fish eggs."

This proposition of law was never contraverted by appellants, but was accepted at the trial. However, in view of the errors made by this Court as set forth in

Paragraph A, (1), (2), and (3) of this petition, it becomes immediately apparent that appellants were entitled to the giving of their requested instruction No. 31, Assignment of Error No. 7, pages 16 and 17 of appellants brief. How can this Court hold that appellants were not entitled to an instruction *on the crucial point that this Court cites as being conclusive.* Appellants were entitled to have the matter submitted intelligently and properly to the jury. In the lengthy instructions given by the trial judge, only the most meager reference is made, R118, to the proposition that plaintiffs must show causal connection between the fluorine emissions and the damage to the trout and eggs.

B. Surely the appellants are entitled, on their Assignment of Error No. 7, page 15 of appellants brief, to some reference to the authorities cited, which are virtually undenied by appellees. We submit it was substantial error to refuse this instruction which was most relevant to the measure of damages.

This Assignment of Error was for reasons unknown to us completely bypassed in the Court's decision.

C. The case of *Comeau v. Beck,* 319 Mass. 17, 64 NE 2d 436, which the Court regards as conclusive in the present case is clearly distinguishable from the case at bar, and it is not in accordance with the rule of law in the State of Idaho.

There, the Massachusetts court held that where there was medical testimony that a blow to the abdo-

men might cause injury producing miscarriage, when coupled with proof of a severe blow to the abdomen, this was sufficient to take the case to the jury. The Court held this "with hesitation." It did *not* hold that the medical testimony uncoupled with a showing of a blow or injury was sufficient for causal connection.

Under the facts in the case at bar, because Dr. Gale testified to the tolerance level of 3 ppm F, this does not begin to meet the test of the Massachusetts case, without further testimony that the fish or eggs were subject to such a level of fluoride above 3 ppm. There simply is no such testimony, excepting one single, isolated sample of 4.7 in the water over a period of four years. Dr. Gale further positively stated that he was not talking in terms of running water or water in a spring, but that his testimony concerned the amount either *constantly ingested* or *constantly in contact with the cell.*

What the Massachusetts court meant is shown by its later opinion, *In Re. Sevengy's Case*, 151 NE 2d, 258, where *Comeau v. Beck* (supra) was cited and distinguished.

This Court, in its Opinion, holds the Comeau case authority for the proposition that over 3 ppm F in constant concentration in water is damaging to fish, and thus the causal tie is made, *without proof of a concentration of such amount of fluorine.* There is positive proof that such concentration did not exist!

The causal connection in the Comeau case was estalished by the fact that the plaintiff suffered a severe

blow to the abdomen, when coupled with the medical testimony on the effect of such a trauma.

Destroying this Court's analogy, where in the record is the proof of the fish being in a constant environment of 3 ppm F?

The testimony of Dr. Wohlers that fluorosis is not the cause, is the only testimony on the subject and Dr. Wohlers is not discredited as this Court concluded in misreading his testimony.

We submit that the cases set forth under VI (A) of our opening brief are by far more applicable to the case at bar, both as to similarity of facts and law.

The Court comments on the dearth of controlling Idaho law on the proof necessary to establish causal connection between act and injury—(Opinion, page 10). We agree that each case must be governed by its own facts.

Idaho has an unbroken line of decisions dating back to 1895, which hold that the question of proximate cause cannot be left to the speculation, inference or conjecture of the jury. *Holt v. Spokane Ry Co.*, 40 Pac. 56 (Idaho) (1895). As stated in *McMaster v. Warner*, 258 Pac. 547 (Idaho) (1927) at page 552, where there was a suspicion, *but no probability* that livestock was infected with a disease of which the vendor thereof was aware:

> "Here, the only manner in which the heifer became unfit for the purpose for which she was purchased arose solely from the fact that at some

time she was attacked by the germ ray fungus with disastrous results to her as well as other animals of appellant's herd. It might be said that on account of the scar described by Dr. Erskine and others a suspicion might arise that she might have been affected with and operated on for lumpjaw before the sale. This reasoning is unsound for the rule has been repeatedly announced in this state that every party to a law action has a right to insist upon a verdict or finding based upon the law and the evidence in the case and not, in the absence of evidence, upon mere inference and conjecture."

The court cites the Holt case supra, among others in support of this principle. See also *Hargis v. Paulsen*, 166 Pac. 264, (Idaho - 1917); *Clark v. Chrisop*, 241 P (2d) 171 (Idaho - 1952); and *Splinter v. City of Nampa*, 256 P (2d) 215 (Idaho - 1953), cited in our opening brief, and in which our highest court, following the historically established pattern, stated, pg. 22:

> "*The weakness of appellant's case is the want of evidence to establish a causal connection between the location of the tank and the explosion otherwise than by speculation and conjecture. The law requires some substantial evidence that the negligence alleged was the proximate cause of the injury.*"

D. The fluorine cases cited in appellants brief in the Ninth Circuit and Tenth Circuit are directly applicable in the instant case to the scientific and legal principle involved.

Rather than repeat the argument from our opening brief in this connection, we respectfully ask this Court to review pages 37-40 thereof. Standards have been approved by this Court in measuring fluorine cases, which the Meaders in the instant case have wholly failed to meet. Justice Hamlin makes no reference to these cases whatever, yet they do exist, and are applicable to a resolution of the questions posed in this litigation.

E. The Opinion of the Court, pages 11 and 12, shows a complete misapprehension of appellants' position. Appellants do not and did not claim that appellees were required to introduce all their available evidence or that they were required to call their experts. We do submit, however, this Court, under the authorities, should consider the proposition of law submitted and raised by appellants as to the presumption which stems from appellees failure to put in such available evidence. It has a direct bearing on a fair analysis of the case and appellants further were not required to request any instruction to the jury. The presumption is, if Dr. Greenwood's analysis of Meader's dead fish, Exhxibit 17, had shown fluorine, Meader would not have overlooked it. The Opinion states:

> "It is not clear from appellants just what they expect this Court to do, but we will do nothing * * * "

All the appellants expect the Court to do is to apply

the applicable law to the case before it, and to this appellants are entitled.

In point on this question are the following Idaho cases: *Coeur d'Alene Lead Co. v. Kingsbury and Hensen*, 85 P 2d 691; *Vollmer v. Vollmer*, 266 Pac. 677; *Garrett v. Neitzel*, 285 Pac. 472; *Common School Dist. No. 27 v. Twin Falls Nat. Bank*, 299 Pac. 662; *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 6 Pac. 2d 486; *Gem State Sales Co. v. Rudin Brothers, Inc.* 41 P 2d 614, 615.

IV. CONCLUSION

In the best of faith, and with proper deference to the panel that has heard this appeal, we must call to the attention of the entire court, the fact that appellants have not received a proper consideration of the questions raised in this appeal. This conclusion is at once inescapable from a careful analysis of the opinion of the Court dated August 25, 1961. The obvious and apparent errors made with respect to the evidence, the erroneous conclusions based on such misunderstanding of the evidence, and the failure to give consideration of any kind to the other matters raised on the appeal, as herein pointed out, makes us confident that this Court must and will afford relief to the appellants.

We respectfully request therefore, that in the alternative there be a reversal of the judgement, or that this petition for en banc rehearing be granted.

Respectfully submitted,

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